No. 95-2074

(8)

Supreme Court, U.S.
FILED
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CLERK

In The

Supreme Court of the United States

October Term, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

versus

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent,

and

UNITED STATES OF AMERICA,

Intervenor-Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 25, 1996
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[1] Exhibit A, Ordinance 91-05 is reprinted in the Appendix to the Petition for Certiorari at 46a.

[2] Due to poor reproduction quality, the Historical District Map has been omitted. It may be found in the Record at page 273.

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5/23/94	Plaintiff's Original Complaint filed
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9/21/94	Defendant's First Amended Answer filed
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9/29/94	Plaintiff's First Amended Complaint filed
10/6/94	Defendant's Motion for Leave to File Second Amended Original Answer
10/17/94	Defendant's Second Amended Original Answer filed
1/6/95	Plaintiff's Motion for Partial Summary Judgment
1/25/95	Defendant's Response to Motion for Partial Summary Judgment
2/2/95	Defendant's Motion for Leave to File Third Amended Answer
2/2/95	Defendant's Third Amended Answer filed
2/3/95	Order entered: Certification from the U.S. District Court for the Western District of Texas to Janet Reno, Attorney General
2/28/95	Plaintiff's Second Amended Complaint filed

3/1/95	Joint Pre-Trial Order filed
3/3/95	Defendant's Brief filed on the issue of the Constitutionality of the Religious Freedom Restoration Act
3/6/95	United States' Memorandum of Law in Support of the Constitutionality of the Religious Freedom Restoration Act filed
3/6/95	Plaintiff's Reply Brief filed on the issue of the Constitutionality of the Religious Freedom Restoration Act
3/10/95	Defendant's Fourth Amended Answer filed
3/10/95	Defendant's Reply Brief to the Plaintiff's Brief and the United States' Memorandum of Law in Support of the Constitutionality of the Religious Freedom Restoration Act
3/15/95	Order entered on Interlocutory Appeal to the Fifth Circuit Court of Appeals
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3/15/95	Notice of appeal and certified copy of docket to USCA: appeal
3/15/95	Judgment of District Court entered
3/16/95	Order granting U.S. leave to intervene
3/31/95	Memorandum of Law by U.S. filed in support of the constitutionality of the Religious Freedom Restoration Act filed
3/31/95	Plaintiff's Reply Brief filed on the issue of Constitutionality of the Religious Freedom Restoration Act
5/9/95	Order granting leave to appeal

1/23/96	Opinion and judgment of the Court of Appeals for the Fifth Circuit Court
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

P.F. FLORES,	§	
ARCHBISHOP OF	§	
SAN ANTONIO	§	**CIVIL ACTION**
	§	**NO. SA94CA0421**
V.	§	
	§	
THE CITY OF BOERNE	§	

SECOND AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES P. F. FLORES, ARCHBISHOP OF SAN ANTONIO, Plaintiff, and, as permitted by the Court's Order of February 2, 1995, files his Second Amended Complaint against THE CITY OF BOERNE, Kendall County, Texas, Defendant, and for cause of action would show the Court the following:

PARTIES

1. P. F. Flores is the Archbishop of San Antonio ("Archbishop"), and is a resident of San Antonio, Bexar County, Texas.

2. The City of Boerne ("City") is an incorporated municipality located in Kendall County, Texas. The City has been served with citation and has entered its appearance herein.

3. The Attorney General of the State of Texas has been served with citation pursuant to Section 37.006 of the Texas Civil Practice and Remedies Code.

4. The Attorney General of the United States of America has acknowledged receipt of the Court's Certificate of February 3, 1995, pursuant to 28 U.S.C. § 2403(a).

JURISDICTION

5. This Court has jurisdiction of this civil action pursuant to the provisions of 28 U.S.C. § 1331.

VENUE

6. Venue of this civil action is proper in this Court under the provisions of 28 U.S.C. § 1391(b) for the following reasons:

a. A substantial part of the events or omissions giving rise to the claim occurred in this district; and

b. A substantial part of the property that is the subject of the action is situated in this district.

FACTUAL BACKGROUND

7. P. F. Flores, in his capacity as Archbishop of San Antonio, owns the building and appurtenant land commonly known as Saint Peter Catholic Church in the City of Boerne (the "Church" or "Saint Peter Church"). The Church is within the Archdiocese of San Antonio and is used exclusively for the practice of religion.

8. Since the Church was built in 1923, and especially in recent years, the population of the City of Boerne and the parish membership of Saint Peter Church have greatly increased. Saint Peter Church no longer has room to seat its parishioners at regular services.

9. In December of 1990, Plaintiff gave the parish priest, Reverend Anthony Cummins, permission to begin planning to enlarge St. Peter Church. A planning committee was established in March of 1991, and Saint Peter Church began planning an enlargement of the existing Church to afford seating space for parishioners at Sunday services.

10. Three months later, on June 25, 1991, the City Council enacted Ordinance Number 91-05 providing for the appointment of an Historic Landmark Commission (the "Landmark Commission"). A true and correct copy of Boerne City Ordinance Number 91-05 is attached hereto as **Exhibit "A"** and incorporated herein for all purposes.

11. Pursuant to the authority delegated to it by Ordinance Number 91-05, the Landmark Commission proposed the designation of an Historic District, which was adopted by the City Council in January of 1992 as Ordinance 91-15, (the "Historic District"). The Ordinance included and referred to the boundary on the historic district as drawn on the historic overlay map, but did not refer to or include the list of specific structures to be included in the historic district. The plat of the Historic District promulgated by the City shows the west boundary of the District bisecting the Church, placing the facade of the Church within the District and the remainder of the Church outside the District. The original church, erected in the 1860's, is also outside the boundary of the District. A true and correct copy of Ordinance Number 91-15 with the plat depicting the boundaries of the Historic District is attached as **Exhibit "B"** and incorporated herein for all purposes.

12. Saint Peter Church itself has not been designated as an historic landmark. The Archbishop did not oppose the inclusion of the facade in the Historic District. Based upon the representations of members of the Landmark Commission, the Planning and Zoning Commission, the City Council or members of their staffs at public hearings to consider enactment of the Ordinance designating the Historic District, and in correspondence related to the establishment of the Historic District, that only the facade of the Church inside the boundary of the Historic District would be protected from alteration and that the remainder of the property could be altered as the Archbishop and Saint Peter Church deemed necessary and advisable, and in reliance on such representations, Saint Peter Church expended large sums of money to finalize plans for the enlarging of the church building. These plans were submitted to the City on or about December 13, 1993. The plans call for the facade of Saint Peter Church inside the boundary of the Historic District to remain in place and unchanged. The renovations planned for Saint Peter Church will affect only those portions of the property which lie outside the boundary of the Historic District.

13. On or about December 13, 1993, the Archbishop, through his representative, requested a building permit from the City. The architectural plans and drawings submitted with the application require the demolition of the part of the Church outside the boundary of the Historic District. The Landmark Commission voted on February 15, 1994 to recommend that the City deny the building permit.

14. On February 17, 1994, the City Building Inspector, Ed Beasley, sent a letter to Mr. Gregory Davis, Davis-Rupe Architects, as representative of the Plaintiff, reporting the Landmark Commission's decision pertaining to the building permit application.

15. The changes required by the Historic Landmark Commission in the proposed plans specified that any new plans "shall not include demolition of the existing structure referred to as St. Peter's Church."

16. The Historic Landmark Commission offered to "work with" Plaintiff if Plaintiff submitted plans to build a new structure in the Historic District which would not include the demolition of the existing structure.

17. Plaintiff's representatives, the St. Peter Church Planning Committee members, Plaintiff's architect, Gregory Davis, or members of Defendant's staff had several meetings between February and April 1994 at which Plaintiff attempted to obtain guidance from Defendant as to specific changes which would be required for Plaintiff to obtain a building permit to enlarge St. Peter Church.

18. In accordance with suggestions put forth by some of Defendant's council members of staff at these meetings, Plaintiff's architect, Gregory Davis, revised his proposed plans to lower the roof line of the proposed church expansion by approximately three feet and to move the proposed new part of the structure back five feet.

19. These changes to the plans would have increased the costs of construction by at least $30,000.

20. On April 6, 1994, Plaintiff asked to be put on the City Council agenda for April 12, 1994 to appeal the decision of the Landmark Commission.

21. The proposed revised plans and the original plans were submitted to the City Council of the City of Boerne at a regular meeting on April 12, 1994, but the City Council voted to deny Plaintiff's appeal of the Landmark Commission's decision.

22. The St. Peter Church site owned by Plaintiff in Boerne is not suitable for building a new church, retaining the old church, and building or retaining the existing structures necessary to support the religious functions of the St. Peter Church parish.

23. An alternative design that recognizes the constraints of the terrain and pays due regard to the liturgical aspects of the Church would cost substantially more than the plans submitted to the building inspector for the City of Boerne and substantially more than the revised plans submitted to the City Council on April 12, 1994.

24. In recent years the Catholic Church has adopted numerous liturgical changes, some of which recommend that when new churches are constructed or existing churches substantially modified, the seating arrangements be configured around the altar, and this in turn dictates the shape of the sanctuary. The proposed renovation to the sanctuary of Saint Peter Church incorporates this liturgical change.

25. The present use of Saint Peter Church is as a parish church. The present building is not large enough to afford seating for those parishioners who come to

worship at regularly scheduled services. The mission of Saint Peter Church cannot be accomplished, nor can it survive as a parish church, without expansion to accommodate the regular attendance at its Sunday services.

26. Unless Plaintiff is permitted to enlarge St. Peter Church, the Church property will be unusable for its intended and present use, that is, as a parish church and for related parish structures and religious activities.

27. To stabilize and preserve the existing church (if a new church were constructed elsewhere), would require the expenditure of substantial parish funds for a non-religious purpose.

28. The proposed plans as submitted by the Plaintiff to the Defendant meet all fire, health and safety standards imposed by the City and by the State of Texas.

FIRST CAUSE OF ACTION

THE RELIGIOUS FREEDOM RESTORATION ACT

29. The Ordinance, as applied to Plaintiff, violates Section 3 of the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, Pub. L. No. 103-141, 42 U.S.C. § 2000bb, et seq. (the "Act"), in that it "substantially burden(s) a person's exercise of religion." The denial by Defendant of Plaintiff's application for a building permit for the enlargement of the church imposes a significant burden on the free exercise of religion by preventing the parishioners of St. Peter Church from attending Mass in accordance with the tenets and teachings of the Catholic Church. The other burdens imposed upon the free exercise of religion include:

a. religious burdens:

(1) the inability to enlarge the church as necessary to accommodate the parishioners who seek to attend religious services;

(2) infringement on the associational rights of the members of Saint Peter Church to practice their religion as a religious community;

(3) the inability to use the 1923 structure as a sanctuary for Sunday mass due to its insufficient size;

(4) forcing Plaintiff to find an alternative site for religious worship;

(5) requiring Plaintiff to maintain a non-functional and too small structure which serves no use to Plaintiff;

(6) requiring Plaintiff to seek approval of a government body before altering the Church, whether or not the alteration is for religious purposes;

(7) controlling the belief and message as expressed through the Church building design and siting which are intended by Plaintiff to convey religious beliefs;

(8) imposing controls on the interior of the Church and the sanctuary so that it cannot be conformed to the liturgical recommendations of the Catholic Church by refusing to grant a building permit;

(9) taking of available building space for other parish development needs by forcing Plaintiff to maintain the 1923 church as a separate building;

(10) requiring or attempting to require inhospitable siting for the new church structure (which in this case particularly burdens more elderly or handicapped parishioners due to the steep terrain); and

b. financial burdens:

(1) maintenance of the 1923 church structure and repair of its structurally unsound elements;

(2) utility expenses for the 1923 church structure;

(3) increased construction costs through the design controls which will or could be imposed by the City; and

(4) the inclusion of the Church in the Historic District limits the market for Plaintiff's property to only those who can use a church structure and thereby substantially reduces the value of the Church property.

30. The City's interest in historic district preservation is not a compelling state interest within the meaning of the Act.

31. Even if the City's interest in historic district preservation were a compelling one, which it is not, the City's draconian method of furthering that interest, to wit, precluding Plaintiff from any alteration of the 1923 St. Peter Church, is not the least restrictive means of furthering the City's interest.

SECOND CAUSE OF ACTION

THE FREE EXERCISE OF RELIGION

32. The City's refusal to issue a building permit to Plaintiff as detailed in paragraphs 7-21 above violates the First Amendment to the United States Constitution, as extended to the States by the Fourteenth Amendment.

33. The Defendant's historic preservation ordinance 91-05, as amended by ordinances 91-15 and 94-17 (assuming, *arguendo,* that ordinance 94-17 applies in this case, which Plaintiff disputes) is neither a penal statute nor a valid and neutral law of general applicability within the meaning of Employment Division, Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). Defendant contends that the historic district was created after making individualized assessments of the structures located upon each piece of property in the proposed district. Such an individualized determination cannot be said to create a neutral ordinance of general applicability.

34. The ordinance impermissibly burdens the free exercise of religion as set forth in paragraph 29 above.

35. This case presents a "hybrid" claim within the meaning of that phrase in Employment Division, Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) because:

(a) the free speech rights of the Plaintiff to express his religious beliefs through design and siting are infringed;

(b) the associational rights of the parishioners of St. Peter Church to assemble and communally worship in the exercise of their religion are infringed; and

(c) the involvement of the Defendant in the design of the new sanctuary impermissibly entangles the City in the internal affairs of the Plaintiff, and permits the City to pass judgment on and to dictate design elements which are either directly or indirectly religious in nature.

36. The requirement that St. Peter Church redesign its proposed enlargement of the Church to avoid demolition of the present structure imposes significant burdens on the free exercise of religion as are more fully set forth in paragraph 29 above.

37. The advancement of historic preservation is not a compelling state interest.

38. The actions of the City in denying the building permit and in requiring that no demolition of St. Peter Church take place in order to grant a building permit were not the least restrictive means of furthering the City's interest in the preservation of the historic district.

THIRD CAUSE OF ACTION

FREEDOM OF SPEECH AND ASSEMBLY

39. The actions of the City as alleged in paragraphs 7-21 violate the First Amendment to the United States Constitution, as extended to the States by the Fourteenth Amendment, in that they restrict freedom of expression and speech and infringe on the parishioners' rights to assemble to exercise their religious beliefs.

40. The Church building is an expression of Christian belief and message and conveying religious beliefs is a part of the Church's function. The control of the Church

exterior by the Defendant is a restriction on freedom of expression and speech.

41. The refusal of the Defendant to grant a permit for the enlargement of the Church necessarily imposes controls on the interior of the Church and the sanctuary so that it cannot be conformed to the liturgical recommendations of the Catholic Church, thereby imposing an additional restriction on freedom of expression and speech.

42. The associational rights of the members of Saint Peter Church exercised in furtherance of their First Amendment right to exercise their right of freedom of speech and of free exercise of religions are burdened by the City's refusal to permit Plaintiff to enlarge the Church to accommodate its parishioners.

43. The nature of the free speech expressed by the design of the St. Peter Church is religious in character, and merits a high degree of protection.

FOURTH CAUSE OF ACTION

THE HISTORIC DISTRICT DUE PROCESS & EQUAL PROTECTION

44. The City's refusal to grant a building permit to Plaintiff was unlawful and an impermissible exercise of the police power, and a violation of Plaintiff's rights under the due process and equal protection clauses of the Fifth Amendment to the United States Constitution for the following reasons:

a. The part of Saint Peter Church for which the building permit is sought is outside the boundary of the

Historic District and therefore, the City did not have the power under the Ordinance to deny the application.

b. The actions of the Defendant in designating the Historic District were arbitrary and unreasonable and therefore, not a valid exercise of the police power. Although the Ordinance purports to set out criteria and guidelines (which are themselves subjective and therefore invalid) the actual boundaries of the Historic District were arbitrarily created by drawing a line on a map one lot deep from Main Street.

c. The creation of the Historic District violates Local Government Code Section 211.004, which requires that all zoning regulations be adopted in accordance with "a comprehensive plan." The Ordinance directs the Landmark Commission to adopt a Preservation Plan to be included in the "comprehensive plan" for the City of Boerne. Although the City has "a comprehensive plan," the Landmark Commission failed to adopt a "preservation plan" to be included in the Boerne comprehensive plan before designating the Historic District. Therefore, the designations of historic landmarks and historic districts by the Landmark Commission are not supported by objective criteria and guidelines, but only by the subjective and arbitrary opinions of the members of the Landmark Commission. As such, the Ordinance reposes unchecked discretion in the members of the Landmark Commission.

d. In the absence of a preservation plan, the Landmark Commission exercises unbridled discretion and authority with respect to its descriptions of the

changes necessary before a building permit application can be approved.

e. The Ordinance vests in the building inspector the discretion to determine whether a building permit or a certificate of appropriateness is required, but it does not specify the criteria for making this determination. The Ordinance is thus vague and indefinite, as applied to Plaintiff.

f. The Ordinance is not intended to apply or by its terms cannot be applied to a Church for the following reasons:

(1) Section 3.1.4 of the Ordinance provides the preservation plan shall "suggest sources of funds for preservation and restoration activities and acquisitions, to include Federal sources, State sources, foundation sources, local private sources, as well as municipal assistance." The incentives thus provided for in this section of the Ordinance are for the most part not available to Plaintiff as Federal, State or municipal funding of Plaintiff for preservation and restoration is in violation of the First Amendment to the United States Constitution.

(2) Section 6 of the Ordinance provides in part "Nothing contained in this article or in the designation of a property as being in an historic district or historic landmark shall affect the present use of the property." The definition of USE in the zoning ordinance of the City of Boerne is: "the purpose for which land or structures thereon is designed, arranged, or intended to be occupied or used, or for which it is occupied, maintained, rented or leased." Saint Peter

Church is designed, arranged, occupied, maintained, and intended to be used as a parish church and for no other purpose, thus the landmark ordinance by its own terms cannot interfere with such use. The expansion of a parish church to accommodate a growing congregation in a burgeoning urban area is in pursuit and furtherance of its present use.

FIFTH CAUSE OF ACTION

UNCOMPENSATED TAKING OF PROPERTY AND INVERSE CONDEMNATION

45. The actions of the City as set forth in paragraphs 7-21 violate the Fifth Amendment to the United States Constitution, as extended to the States by the Fourteenth Amendment, in that they constitute the taking of private property without just compensation, as is more fully set forth below:

(a) The denial by the Defendant of the permit that would enable Plaintiff to enlarge the Church to accommodate the congregation prevents the Church from carrying out its purpose and constitutes a naked taking.

(b) The inclusion of the facade of Saint Peter Church in the Historic District and the design controls connected with that inclusion imposed a servitude on Plaintiff's property for the benefit of others who are not compelled to contribute to Plaintiff's increased costs and constitute a naked taking.

(c) The inclusion of the facade of Saint Peter Church in the Historic District limits the market for Plaintiff's property to only those who can use a church structure and thereby substantially reduces the value of the Church property.

SIXTH CAUSE OF ACTION

RELIGIOUS FREEDOM UNDER THE TEXAS CONSTITUTION

46. Plaintiff contends that the Defendant's ordinance, as applied to Plaintiff, is unconstitutional under both the United States Constitution and, as separate and independent grounds, under various provisions of the Constitution of the State of Texas.

47. The City's actions constitute a violation of the protection of the organic rights expressed in the Bill of Rights of the Texas Constitution and as specifically guaranteed by Article 1, Section 29.

48. The Ordinance as applied to Plaintiff violates Section 6 of Article 1 of the Texas Constitution, which provides:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the Legislature to pass such laws as

may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.

49. The Texas Bill of Rights provides different and substantially stronger protection of religious liberty than that afforded by the U.S. Constitution. The ordinance of the City, as applied to Plaintiff, interferes with and controls the rights of conscience in matters of religion and prevents, rather than protects, religious worship. The City's ordinance, as applied to Plaintiff, forces Plaintiff to support and maintain the 1923 St. Peter Church structure, and forces Plaintiff to erect a new church structure which suits the design and siting whims of the Landmark Commission and the Boerne city council.

50. The City's actions constitute a violation of the protection of freedom of religion as guaranteed by the provisions of Article I, Section 6 of the Texas Constitution. The plain reading of the religious freedom clause of the Texas Constitution shows that it affirmatively protects the rights of public worship, and requires the legislature to enact laws which protect that right.

SEVENTH CAUSE OF ACTION

TAKING OR DAMAGING OF PROPERTY WITHOUT DUE COURSE OF LAW

51. The actions of the City as set out in paragraphs 7-21 violate Sections 17 and 19 of Article 1 of the Texas Constitution, which prohibit the taking or damaging of private property without just or adequate compensation and without due course of law.

52. The ordinance as applied to Plaintiff constitutes an unconstitutional taking or damaging of Plaintiff's property without due course of law. The ordinance applies only to a designated area, lowers the value of Plaintiff's property, provides, as to Plaintiff, no compensating benefits such as tax abatement, and makes the property unusable for its present purposes as a parish church (in violation of the ordinance itself which provides that the ordinance shall not have any effect on preexisting uses). The refusal of the City to permit the enlargement of St. Peter Church deprives Plaintiff of all beneficial use of his property as it was intended to be and has been used since 1923. The ordinance imposes an impermissible servitude on Plaintiff's property, which damages its value and which was imposed without due course of law, as is more fully set forth in paragraph 44.

EIGHTH CAUSE OF ACTION

DECLARATORY JUDGMENT

53. The Archbishop requests a declaratory judgment, pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., that the Ordinance as applied to Saint Peter Church is invalid, unconstitutional, null and void. Alternatively, Plaintiff requests a declaration under the Federal Declaratory Judgment Act that the ordinance, as applied to Saint Peter Church, affects only the facade of the church building and does not prohibit the demolition or the reconstruction of any other portion of the property.

NINTH CAUSE OF ACTION

ATTORNEYS' FEES

54. The Archbishop has been required to retain the undersigned attorneys to represent his interests in this action and has agreed to pay to said attorneys reasonable and necessary attorneys' fees. An award of reasonable and necessary attorneys' fees to Plaintiff is authorized by 42 U.S.C. § 1988 and by 28 U.S.C. § 2201 et seq.

STANDING

55. The Archbishop has exhausted the appellate procedure provided in the Ordinance; however, he is not required to exhaust any administrative remedies prior to bringing the instant civil action.

WHEREFORE, PREMISES CONSIDERED, Plaintiff, P. F. Flores, Archbishop of the Catholic Archdiocese of San Antonio, prays that upon hearing of this cause, the Archbishop have:

a. Judgment declaring the actions of the City in denying a building permit for the enlargement of Saint Peter Church to be unconstitutional, invalid, null and void;

b. Judgment reversing the decision of the Landmark Commission and City Council of Boerne and directing the City's building inspector to issue the building permit applied for by the Archbishop on December 13, 1993.

c. Judgment enjoining the Defendant and its agents, attorneys, successors, and or assigns from enforcing or

attempting to enforce any City Ordinances concerning Historic District as to Saint Peter Church;

d. Judgment for reasonable and necessary attorneys' fees, together with costs of Court; and

e. Judgment for such other and further relief to which he may be justly entitled.

Respectfully submitted,

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San Antonio, Texas 78205
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By: /s/ Thomas Drought
Thomas Drought
State Bar No. 06136000
Patricia J. Schofield
State Bar No. 17800900

ATTORNEYS FOR
PLAINTIFF, P. F.
FLORES, ARCHBISHOP
OF SAN ANTONIO

EXHIBIT B

ORDINANCE NO. 91-15

AN ORDINANCE ADDING THE HISTORIC (OVERLAY) DISTRICT TO THE CITY OF BOERNE ZONING MAP (REVISED 1991);

WHEREAS, the legislature of the State of Texas has enacted Chapter 211. Municipal Zoning Authority," Local Government Code, empowering cities of the State of Texas to adopt regulations and restrictions for the preservation and protection of historical places and areas of historical and cultural importance and significance; and

WHEREAS, the City Council of Boerne is aware that the City of Boerne has various areas, places, buildings and structures having significant historical value which reflect the heritage of the state, and its people; and

WHEREAS, it is recognized that rapid change in population, economic functions and land use activities has led and is leading to the increased demolition of these landmarks so that the city, the state, and the nation are thereby losing a part of their heritage

WHEREAS, the City of Boerne Historic Landmark Commission and the City of Boerne Planning and Zoning Commission have recommended that a Historic District be designated;

NOW, THEREFORE, be it ordained by the City Council of the City of Boerne, Texas,

THAT, the City of Boerne, Texas, Zoning Districts map dated 1979, revised 9/91 be amended to include the Historic District as shown on the attached map.

READ and APPROVED on first reading this, the 10th day of December, 1991.

READ, APPROVED and ADOPTED on second reading this, the 14th day of January, 1992.

APPROVED:

/s/ Patrick Heath
Patrick Heath, Mayor

ATTEST:

/s/ Bernell Norton
Bernell Norton, City Secretary

[LOGO] **CITY OF BOERNE**
402 E. Blanco P.O. Box 1677
Boerne, Texas 78006-1677
(512) 249-9511 FAX (512) 249-9264

January 23, 1992

At the January 14th, 1992, City Council meeting the City Council passed on second reading the ordinance setting out the perimeter of the Historic District in the City of Boerne.

Now that the Historic District has been established, most changes to the facade of a structure facing a street (or new construction) must be reviewed by the Landmark Commission.

The contact person at the City for the review process is the building inspector. He will speak to property owners or review plans and determine whether or not the Landmark Commission needs to speak to the owner or review the plans. The Landmark Commission has indicated that they will react as quickly as possible to all requests but all meetings have to be posted for 72 hours (Open Meetings Act) so all of us are going to have to plan ahead so that projects proceed in a timely manner.

We have enclosed two items for your information; 1) a map of the boundaries, if your property/structure is not within the boundaries, then you are not included in the district, 2) some information we put together that we hope may provide a little background for you.

If you have any questions, please give me a call.

Sincerely,

/s/ Christopher A. Turk
Christopher A. Turk
Director of Planning & Community Services

CAT:pas

Enclosure

WHAT DO YOU MEAN, HISTORICAL?

WHY ME? WHAT HAVE WE DONE TO CAUSE THE CITY TO TELL US WHAT WE CAN DO WITH OUR PROPERTY? DO YOU KNOW HOW MUCH THIS WILL COST US?

SOUND FAMILIAR?

THESE ARE SOME OF THE QUESTIONS THAT PROPERTY OWNERS HAVE EXPRESSED TO THE LANDMARK COMMISSION ABOUT THE CREATION OF AN HISTORICAL DISTRICT. PERHAPS WE CAN ANSWER SOME OF THOSE QUESTIONS.

THE STRUCTURES IN THE PROPOSED DISTRICT (SEE MAP ATTACHED) ARE SPECIAL. FOR THE MOST PART THEY ARE OLD, THEY REFLECT WHAT LIFE IN BOERNE USED TO BE AND THE BUILDINGS CREATE AN ATMOSPHERE THAT REPRESENTS TO US AND VISITORS WHAT IS "BEST" ABOUT OUR COMMUNITY.

IT IS OUR RELIEF THAT THE BEST WAY TO INSURE THAT THE COMMUNITY DOES NOT LOSE

THIS PORTION OF THE HERITAGE THAT IS BOERNE, IS TO INCLUDE THOSE PROPERTIES IN A HISTORICAL ZONING DISTRICT. DON'T LET THE WORD "HISTORICAL" FOOL YA. THE STATE HISTORICAL COMMISSION HAS STATED THAT COMMUNITIES SHOULD CONSIDER PRESERVING STRUCTURES BUILT IN THE 1950'S LEST THEY JUST BECOME A MEMORY.

WHAT IS A HISTORIC DISTRICT?

A HISTORIC DISTRICT IS TECHNICALLY "OVERLAY ZONING." THAT MEANS THAT THE HISTORIC ZONING IS ADDED TO YOUR PRESENT ZONING WHETHER IT'S RESIDENTIAL, COMMERCIAL, OR INDUSTRIAL. THE "HISTORIC" DESIGNATION DOESN'T CHANGE THE USE OR ZONING OF YOUR PROPERTY, BUT IT DOES MEAN THAT ALL EXTERNAL CHANGES HAVE TO BE PLANNED AND REVIEWED.

WHO IS THE LANDMARK COMMISSION?

WELL, THE LANDMARK COMMISSION IS MADE UP OF NINE PEOPLE. SOME ARE DESIGN PROFESSIONALS AND SOME ARE JUST FOLKS WHO ARE KNOWLEDGEABLE IN THE FIELD OF HISTORIC PRESERVATION, EACH OF THESE PEOPLE HAS A DEEP INTEREST IN SEEING THAT OUR HISTORIC ARCHITECTURAL PAST IS NOT LOST. THEY HAVE BEEN APPOINTED BY THE CITY COUNCIL. THEY ARE ALSO RESPONSIBLE FOR REVIEWING ALL PROPOSED CHANGES OF ANY KIND IN HISTORIC AREAS AND DETERMINING WHETHER OR NOT THESE PROPOSED

CHANGES WILL FIT IN THE NEIGHBORHOOD. INCIDENTALLY, THEY SERVE WITHOUT PAY.

WHY SHOULD PROPOSED CHANGES BE REVIEWED?

REVIEW PROCEDURES REQUIRED BY HISTORIC ZONING ARE DESIGNED TO PROTECT PROPERTY OWNERS FROM LOSS DUE TO INAPPROPRIATE OR UNWANTED CHANGES AND DEVELOPMENT; SO THESE RESTRICTIONS ACTUALLY HELP KEEP THE NEIGHBORHOOD IN A GOOD STATE OF REPAIR BECAUSE THAT'S EXACTLY WHAT THEY WERE DESIGNED TO DO.

WHAT DO THEY REVIEW?

BASICALLY, THE COMMISSION REVIEWS ALL PROPOSED EXTERNAL CHANGES TO YOUR PROPERTY. THEY DO NOT REQUIRE YOU TO MAKE CHANGES, BUT WHEN YOU PROPOSE CHANGES THEY MUST BE REVIEWED, TO INCLUDE THE **COLOR** OF **PAINT.**

HERE ARE SOME RECOMMENDATIONS TAKEN FROM THE U.S. DEPARTMENT OF THE INTERIOR'S GUIDELINES FOR RENOVATION IN HISTORIC DISTRICTS THAT THE LANDMARK COMMISSION WILL FOLLOW ALSO.

RETAIN DISTINCTIVE FEATURES SUCH AS SIZE, SCALE, MASS, COLORS AND MATERIALS. THINGS LIKE ROOFS, PORCHES AND STAIRWAYS GIVE YOUR NEIGHBORHOOD ITS DISTINGUISHING CHARACTER.

RETAIN LANDSCAPE FEATURES SUCH AS PARKS, GARDENS, STREET LIGHTS, SIGNS BENCHES, WALKWAYS, ALLEYS AND BUILDING SETBACKS WHICH

HAVE TRADITIONALLY LINKED BUILDINGS TO THEIR ENVIRONMENT.

USE NEW MATERIALS WHICH ARE COMPATIBLE WITH THE CHARACTER OF YOUR NEIGHBORHOOD.

BASE YOUR RESTORATION IDEAS AND REMODELING DECISIONS ON ACTUAL KNOWLEDGE OF THE PAST. LOOK FOR OLD PHOTOGRAPHS AND DRAWINGS OF YOUR HOUSE OR OTHERS LIKE IT. GOOD RESOURCES ARE LOCAL LIBRARIES AND THE HISTORICAL SOCIETY.

REPAIR OR REPLACE DETERIORATED MATERIAL WITH NEW MATERIAL THAT DUPLICATES THE OLD AS CLOSELY AS POSSIBLE.

REPLACE MISSING ARCHITECTURAL FEATURES – CORNICES, BRACKETS, RAILINGS AND SHUTTERS.

DISCOVER ORIGINAL PAINT COLORS AND FINISHES AND REPAINT WITH AUTHENTIC COLORS WHEN APPROPRIATE.

PLACE TELEVISION ANTENNA AND MECHANICAL EQUIPMENT IN INCONSPICUOUS LOCATIONS.

INSTALL VERTICAL RUNS OF DUCTS, PIPES, AND CABLES IN CLOSETS, SERVICE ROOMS AND WALL CAVITIES.

COMPLY WITH CODE REQUIREMENTS IN SUCH A MANNER THAT THE ESSENTIAL CHARACTER OF YOUR BUILDING IS PRESERVED INTACT.

YOU WILL NOTICE THAT THESE SUGGESTIONS DO NOT REQUIRE YOU TO USE HISTORICAL MATERIALS SUCH AS ORIGINAL MORTAR, STONE, ETC.,

BUT THEY DO ASK THAT YOU CHOSE NEW MATERIAL THAT DUPLICATES THE OLD.

"MISTAKES" WHICH PROBABLY WILL NOT BE APPROVED BY THE BOARD:

- DON'T PAINT YOUR BUILDING – EVEN THE SAME COLOR – WITHOUT AUTHORIZATION FROM THE BOARD.
- DON'T INTRODUCE NEW CONSTRUCTION INTO NEIGHBORHOODS UNLESS USING A DESIGN WHICH IS COMPATIBLE WITH THE CHARACTER OF THE DISTRICT IN SIZE, SCALE, COLOR AND MATERIALS.
- DON'T DESTROY THE RELATIONSHIP OF BUILDINGS AND THEIR ENVIRONMENT BY INTRODUCING INAPPROPRIATELY LOCATED NEW PARKING LOTS.
- DON'T GIVE THE SITE AN APPEARANCE IT NEVER HAD.
- DON'T APPLY NEW MATERIAL WHICH IS INAPPROPRIATE OR WAS UNAVAILABLE WHEN THE BUILDING WAS CONSTRUCTED, SUCH AS:

  1. ARTIFICIAL BRICK SIDING
  2. ARTIFICIAL CAST STONE OR BRICK VENEER
  3. ASBESTOS OR ASPHALT SHINGLES
  4. PLASTIC OR ALUMINUM SIDING
  5. ALUMINUM STORM OR SCREEN WINDOW COMBINATIONS

6. UNDESIRABLE FENCING MATERIALS - CHAIN LINK, BAMBOO OR REED, PLYWOOD, MASONITE OR PARTICLEBOARD, ASBESTOS PANEL, CONCRETE OR CONCRETE BLOCK (UNLESS PLASTERED), GATES AND WALLS

- DON'T REMOVE ARCHITECTURAL FEATURES THAT ARE AN ESSENTIAL PART OF A BUILDING'S CHARACTER AND APPEARANCE, SUCH AS CORNICES, BRACKETS, RAILINGS, SHUTTERS, WINDOW ARCHITRAVES, AND DOORWAY PEDIMENTS.
- DON'T REPAINT WITH COLORS THAT ARE NOT APPROPRIATE TO THE BUILDING AND NEIGHBORHOOD.
- DON'T PLACE TELEVISION ANTENNA AND MECHANICAL EQUIPMENT, SUCH AS AIR CONDITIONERS, WHERE THEY CAN BE SEEN FROM THE STREET.
- DON'T INSTALL VERTICAL RUNS OF DUCTS, PIPES, AND CABLES IN PLACES WHERE THEY WILL BE A VISUAL INTRUSION.
- DON'T ATTACH EXTERIOR ELECTRICAL AND TELEPHONE CABLES TO THE PRINCIPAL ELEVATIONS OF THE BUILDING.

MORE ABOUT THE REVIEW PROCESS

THE REVIEW PROCESS BEGINS WITH THE CITY OF BOERNE BUILDING INSPECTOR'S OFFICE. THE BUILDING INSPECTOR WILL REVIEW THE PLANS OF PROPOSED EXTERNAL CHANGES AND NOTIFY THE

LANDMARK COMMISSION. THE LANDMARK COMMISSION WILL REVIEW THE PROPOSED PLANS AND APPROVE OR DISAPPROVE THEM

OUR ORDINANCE REQUIRES THAT TWO (2) COPIES OF DETAILED PLANS, ELEVATIONS, SPECIFICATIONS BE PRESENTED IF REQUIRED BY THE BUILDING INSPECTOR; i.e. ALTERATION OR REMOVAL OF ANY EXTERIOR ARCHITECTURAL FEATURE. THE COMMISSION WILL HAVE TO APPROVE OTHER IMPROVEMENTS SUCH AS COLOR, TEXTURE, MATERIAL USED IN REPAIR, REPAINTING OR MAINTENANCE.

DESIGN ANY SIGNS TO BE OF A SIZE, SCALE, HEIGHT, COLOR AND LOCATION WHICH ARE HARMONIOUS WITH ADJACENT PROPERTIES AND MATCH THE HISTORIC CHARACTERISTICS OF THE DISTRICT.

ALL GRAPHIC ELEMENTS SHOULD REINFORCE THE ARCHITECTURAL INTEGRITY OF YOUR BUILDING. SIGNS SHOULD NOT DISFIGURE OR CONCEAL ARCHITECTURAL FEATURES OR DETAILS AND SHOULD BE PROPERLY SCALED.

??? QUESTIONS ???

OVER THE COURSE OF THE LAST SEVERAL MONTHS OF PUBLIC HEARINGS, SOME INTERESTING QUESTION HAVE BEEN ASKED OF THE COMMISSION. BELOW WE HAVE A FEW OF THE MOST FREQUENTLY ASKED QUESTIONS AND THE COMMISSION'S RESPONSE TO THEM.

IF I OWN A PIECE OF PROPERTY WITHIN THE DISTRICT AND I WANT TO SELL IT, WHAT IMPACT WILL IT HAVE ON IT'S SALE?

When you purchase of own property within a designated historical district you have a guarantee that the area will remain harmonious with the ambiance of the community in which you purchased your property. If your family owned the property, you will be assured that no modern plastic and chrome building will be erected and lower the existing values. This preserves the integrity of the community, and one only has to look at other cities who have been successful in marketing themselves to realize what an atmosphere of historical integrity can do for a city.

WILL PROVIDING THE HISTORIC LANDMARK COMMISSION WITH MY PLANS CREATE A PROBLEM WITH MY TIMING IN GETTING THE WORK DONE?

Often unnecessary delays occur when a person is unaware of the need for review. The Commission and other City staff members who are part of the Historical Review Process will do everything possible to expedite approval. However, you as a property owner, can alleviate many unwarranted delays by being familiar with the guidelines.

WILL THE COMMISSION TRY TO MAKE ALL THE BUILDINGS LOOK ALIKE IF THEY ARE IN THE HISTORICAL DISTRICT?

The purpose is not to make everything look homogeneous, but to make things within the district boundaries "harmonious." This means that the district preserves the

look of buildings of each age of architectural development, with renovations appropriate to the era in which they were built.

BUILDING PERMIT APPLICATION
Jurisdiction of Boerne, Texas

JOB ADDRESS:
SOUTH MAIN – ST. PETER'S CATHOLIC CHURCH

LOT NO. 18, 19, 20, 16, 17, 21

BLOCK NO. _____

TRACT/SUBDIVISION _____

OWNER ARCHDIOCISE OF SAN ANTONIO

CONTRACTOR (NOT SELECTED)
ARCHITECT-DAVIS-RUPE ARCHITECTS

CONTRACTOR'S MAILING ADDRESS
11103 WEST AVE. SUITE 202
SAN ANTONIO, TEXAS (GREGORY DAVIS)
PHONE 210 377-3306
FAX: 377-3365

USE OF BUILDING:
_____ Residential
CHURCH Commercial

SQUARE FOOTAGE:
Living Area _____ Porches _____

Garage _____ Patio _____

CLASS OF WORK: ✓ New ✓ Addition _ Alteration
_ Fence _ Repair _ Move ✓ Demolish

DESCRIBE WORK EXPANSION OF ST. PETER'S CATHOLIC CHURCH AND RELATED SITE IMPROVEMENTS

* * *

*** NOTICE ***

NO PERMIT WILL BE ISSUED UNTIL THIS APPLICATION HAS BEEN FULLY COMPLETED AND A COMPLETE SET OF PLANS, INCLUDING A PLOT PLAN, HAS BEEN DELIVERED TO THE BUILDING OFFICIAL. THE GENERAL CONTRACTOR IS ULTIMATELY RESPONSIBLE FOR ENSURING THAT ALL PERMITS HAVE BEEN OBTAINED. NO CERTIFICATE OF OCCUPANCY WILL BE ISSUED UNTIL ALL PERMITS HAVE BEEN PAID FOR.

* * *

SIGNATURE OF APPLICANT
/s/ Gregory M. Davis – ARCHITECT

DATE REQUESTED DECEMBER 13, 1993

APPLICATION ACCEPTED BY _____

NOTE: PERMITS WILL BE READY WITHIN ONE (1) WORKING DAY OF APPLICATION. FAILURE TO OBTAIN A PERMIT BEFORE CONSTRUCTION WILL RESULT IN FEE BEING DOUBLED.

February 17, 1994

Hand Delivered

Mr. Ed Beasley
Building Inspector
City of Boerne
P. O. Box 1677
Boerne, Texas 78006-1677

Re: Building Permit Application submitted by Gregory Davis of Davis-Rupe Architects, representing the Archdiocese of San Antonio, for the "Expansion of St. Peter's Catholic Church and Related Site Improvements."

Dear Mr. Beasley:

Pursuant to Article VIII, Section 7, "Evaluation of Proposed Exterior Changes to Structures within a Historic District or Designated Historic Landmark," of the City of Boerne Zoning Ordinance, the Landmark Commission is advising you that the proposed work described in the aforementioned permit application will adversely affect the Historic District and is inappropriate or inconsistent with the spirit and purpose of Ordinance No. 91-05, and the Landmark Commission is advising you that the pending permit application submitted by the Archdiocese of San Antonio cannot be approved as submitted.

It is the finding of the Commission on February 15, 1994, that the partial demolition of the existing St. Peter's Church as described by an archdiocesan representative to the Commission at its meeting of February 1, 1994, is inconsistent and inappropriate.

For your information, the Landmark Commission, in making its recommendation to the City Planning and Zoning Commission regarding the creation of the Historic District, specifically identified St. Peter's Catholic Church and in support of the Church's preservation, cited the following criteria:

1. Character, interest or value as part of the development, heritage or cultural characteristics of the City.

3. Embodiment of distinguishing characteristics of an architectural type or specimen.

5. Unique location of singular physical characteristics representing an established and familiar visual feature of a neighborhood, community or the city.

6. Value as an aspect of community sentiment or public pride.

Due to the structure's historical importance to the community and our charge of protecting and preserving certain structures, areas, etc., deemed historical, any new plans shall not include demolition of the existing structure referred to as St. Peter's Catholic Church. Should the applicant wish to pursue construction of a new structure within the Historic District, that would not include the demolition of the existing structure, the Commission would be willing to work with the applicant within the framework of the ordinance.

If you have any questions, please do not hesitate to give me a call.

Sincerely,

/s/ Phillip M. Bell
Phillip M. Bell
Chairman, Historic Landmark Commission
P. O. Box 775
Boerne, Texas 78006
210-249-2140

:pas

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

P. F. FLORES, ARCHBISHOP OF SAN ANTONIO	§	
vs.	§	CIVIL ACTION
	§	NO. SA94CA0421
THE CITY OF BOERNE	§	

AFFIDAVIT OF GREGORY M. DAVIS

My name is Gregory M. Davis. I am a registered architect in the firm of Davis, Durand-Hollis, Rupe, San Antonio, Texas, and I am the architect retained by Saint Peter Church in Boerne to prepare architectural plans for the proposed enlargement of Saint Peter Church. As the representative of P. F. Flores, Archbishop of San Antonio, I presented the plans to the Building Inspector of the City of Boerne for a building permit on December 13, 1993.

After the Landmark Commission recommended that the building permit be denied, I studied alternative plans for accomplishing the needed enlargement of the seating capacity of the Church. In reviewing these plans I considered suggestions offered to me by City Officials and members of the Boerne City Council for plans that might prove acceptable to the Landmark Commission and the City of Boerne.

In planning the enlargement of Saint Peter Church an architect must deal with constraints imposed by the terrain and by the need to preserve surrounding Church property for support buildings that must be constructed in the future (based on the master plan) to serve the

parish. It is my opinion that the alternative concepts produced as a result of my studies would cost substantially more to construct than the design I submitted to the Building Inspector for the City of Boerne on behalf of Archbishop Flores. It is my opinion that an alternative design that recognizes the constraints of the terrain and pays due regard to the liturgical aspects of the Church, that would not require demolition of the sanctuary of the Church, would cost approximately Five Hundred Thousand and No/100 Dollars ($500,000.00) more than the plans I submitted to the Building Inspector of the City of Boerne.

/s/ Gregory M. Davis
Gregory M. Davis

THE STATE OF TEXAS §
§
COUNTY OF BEXAR §

Sworn to and subscribed before me by said Gregory M. Davis, this the 10th day of November, 1994, to certify which witness my hand and seal of office.

(SEAL)
LINDARUTH SANDOVAL
MY COMMISSION
EXPIRES
June 22, 1996

/s/ Lindaruth Sandoval
Notary Public In and
For The State of Texas

/s/ Lindaruth Sandoval
(Notary's printed
name)

My Commission Expires:
6-22-96

AFFIDAVIT

STATE OF TEXAS

COUNTY OF GILLESPIE

BEFORE ME, the undersigned Notary Public, on this day personally appeared Stan Klein, known to me, and, after being duly sworn, stated that the following is within the knowledge of affiant and is true and correct to the best of his knowledge:

"My name is Stan Klein. I am a licensed architect practicing in the State of Texas. I hold a degree in architecture from The University of Texas at Austin. I am active in the practice of architecture, including the design of restoration and rehabilitation of historic structures and sites. I have read and evaluated the affidavit of Gregory M. Davis attached to the Motion for Summary Judgment. In addition, I have conferred with Mr. Davis concerning his design and have reviewed drawings and model prepared by Mr. Davis' firm. Pursuant to a request by the City of Boerne and Council for the City, I am currently involved in site studies to relocate the proposed building footprint on the existing site. That process is necessary to evaluate the costs of construction at a different location, preserving all or substantially all of the existing St. Peter Church.

"At this point in time, my conclusions are incomplete but my tentative analysis leads me to believe that if topography and soil conditions are the same throughout the site, then constructing a building of the same size as

the proposed project on another location at this site should not cost an additional $500,000.00.

One of the options to be considered is the City of Boerne's abandonment of a street right of way for additional parking or construction space, and the accommodations the City would be willing to make in terms of utilities or access."

"Based upon my brief evaluation of the site and the structure itself, its location, the City's historic preservation data and background material, it is my opinion as an architect that the St. Peter Church is a significant building. It is an example, of mission revival architecture. Mission revival architecture is especially significant to the community, since it shows the early awakening of the sense of history represented by the original spanish missions in San Antonio and South Texas, and an attempt to create a visible and aesthetic connection to that original history and culture, in the earlier years of this century. The profile of the siting of the church and its high visibility on a primary access route to the city makes it an especially significant structure within the City itself, coupled with the original church structure on the site, this building, considered along with the others identified within the historic district, is an essential part of recognizing, seeing, and understanding the original development and functioning of society in the City of Boerne. The loss of the building itself, or the attempted preservation of only a small remnant of the building, would destroy

the visible sense and impression of the history and culture that existed at the time of its construction."

/s/ Stan Klein
STAN KLEIN

SUBSCRIBED AND SWORN BEFORE ME on this 1st day of December, 1994, to certify which witness my hand and official seal.

(SEAL)
BARBARA SEGNER
Notary Public
STATE OF TEXAS

/s/ Barbara Segner
Notary Public, State of Texas

My Comm. Exp. 09/25/97

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO	§	**CIVIL ACTION NO. SA94CA0421**
v.	§	
THE CITY OF BOERNE	§	

FOURTH AMENDED ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Defendant, THE CITY OF BOERNE, and files this its Fourth Amended Original Answer to Plaintiff's Second Amended Complaint, and for such answer shows:

General Denial

1. Pursuant to Rules 8 and 11 of the Federal Rules of Civil Procedure, Defendant generally denies all material allegations contained in Plaintiff's Second Amended Complaint and calls upon the Plaintiff to prove said allegations by a preponderance of the evidence as required by the laws of the State of Texas.

Admissions and Denials

2. Defendant admits the allegations contained in Paragraphs 1, 2 and 3 of Plaintiff's Second Amended Complaint.

3. Although no Rule 8 response is necessary, Defendant admits the allegations contained in Paragraphs 4, 5

and 6 of Plaintiff's Second Amended Complaint and further says that venue is proper in the United States District Court for the Western District of Texas, San Antonio Division.

4. Based on the public records that it has reviewed, Defendant cannot admit or deny ownership as alleged in Paragraph 7. Defendant does not know if the Archbishop of San Antonio is the successor to the Archbishop of Galveston, who appears to be the record title holder to the property. Defendant admits that the church is used for the practice of religion, but does not know if the use is exclusive.

5. Defendant does not know, and has not attempted to determine whether or not changes in the scheduling and use of the St. Peter Church sanctuary could facilitate seating of all of its parishioners. The City assumes that the church has a need for additional space, and has assumed that evaluation of this issue would be problematic under the entanglement test of the First Amendment. The remaining allegations in paragraph 8 are admitted.

6. Defendant does not have enough detailed information to admit or deny the allegations of paragraph 9.

7. Under Paragraph 10 of Plaintiff's Second Amended Complaint, Defendant admits that on June 25, 1991, the City Council of the City of Boerne enacted Ordinance Number 91-05 and further admits that Exhibit "A" to Plaintiff's Second Amended Complaint is a true and correct copy of said Ordinance.

8. Under Paragraph 11, Defendant admits the substance of the ordinance and the attached map. Defendant

further admits that the mapped boundary bisects the church structure. Defendant denies that the Historic District includes only the facade of the Church. As further set forth below, Defendant contends that appropriate legal interpretation of the ordinance would include the entire structure. The remaining allegations in Paragraph 11 are admitted. Defendant further says that on July 26, 1988, the Historic Landmark Commission began exploring the creation of an Historic District. A public hearing to determine the Historic District boundary was first held by the Historic Landmark Commission on April 17, 1990.

9. Under Paragraph 12, Defendant admits that St. Peter Church has not been designated as an Historic Landmark, as that term is used in the City's Historic Preservation Ordinances, but would show that the property would be eligible for historic landmark designation under applicable Texas law. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations that the Archbishop did not oppose the inclusion of the facade, or any other part of the church building, in the Historic District. Defendant admits that St. Peter Church expended a significant sum of money on plans to enlarge the church building. Defendant denies the remaining allegations contained in Paragraph 12 of Plaintiff's Second Amended Complaint.

10. Under Paragraph 13, Plaintiff says that on or about December 14, 1993, the City received a building permit application from Gregory Davis of Davis-Rupe Architects, representing the Archdiocese of San Antonio, for the "Expansion of St. Peter's Catholic Church and Related Site Improvements" proposing substantial destruction of the church. Defendant denies that the

church expansion requires the destruction of a part of the Church, and denies the claim that part of the building is not controlled by the ordinance. The remaining allegations contained in Paragraph 13 of Plaintiff's Second Amended Complaint are admitted.

11. Defendant admits the allegation of Paragraphs 14, 15, 16, 17, and 18 of the Plaintiff's Second Amended Complaint.

12. Defendant has insufficient information to admit or deny the allegations of Paragraph 19 of the Plaintiff's Second Amended Complaint.

13. Defendant admits the allegations of Paragraph 20 of the Plaintiff's Second Amended Complaint.

14. Defendant admits the allegations of Paragraph 21 of the Plaintiff's Second Amended Complaint.

15. Defendant denies the allegations of Paragraph 22 of the Plaintiff's Second Amended Complaint. Defendant will show that it is feasible for the St. Peter Church to build the structure that it needs or desires, while retaining and preserving the 1923 church structure.

16. Defendant denies the allegation in Paragraph 23 that alternative siting or location of the proposed church will necessarily cost substantially more than the plans submitted to the City. Defendant will show that several alternatives exist which will result in minimal additional costs. Other alternatives exists which would cost a greater amount of money, but would be offset by other advantages, including availability of additional space. Other alternatives also exist which would allow the same amount of space to be created for the church's activities

on the site, at a substantially lower cost than the estimate prepared by the Plaintiff's architect.

17. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 24 of the Plaintiff's Second Amended Complaint, however, Defendant has assumed that there are liturgical reasons for the internal design change and has not contested this allegation.

18. Defendant does not know if alternative utilization of the present building could accommodate and afford seating for all parishioners at regularly scheduling services. However, Defendant has assumed that the church's contention concerning the need for expansion and additional seating is valid. On this basis, the remaining allegations of Paragraph 25 are admitted.

19. Defendant does not know if alternative utilization of the present building could accommodate and afford seating for all parishioners at regularly scheduling services. However, Defendant has assumed that the church's contention concerning the need for expansion and additional seating is valid. On this basis, the remaining allegations of Paragraph 26 are admitted.

20. Defendant denies the allegations of Paragraph 27. The Defendant's ordinance does not limit the internal modification, remodeling, or alternative utilization of the 1923 church structure.

21. Defendant has insufficient information regarding the allegations in Paragraph 28, and has not made a

determination concerning code compliance as to the submitted plans. Defendant presently has no reason to deny the allegation.

22. Paragraph 29 sets forth the Plaintiff's legal conclusions concerning the alleged violation of the Religious Freedom Restoration Act ("RFRA"). Defendant denies that its ordinance is in violation of that act, which Defendant contends is unconstitutional. Defendant further specifically denies that the church is unable to enlarge its facility under the ordinance. Defendant denies that significant associational rights are infringed. Defendant denies that its ordinance forces the Plaintiff to find an alternative site, if that allegation means to a different parcel of property. Defendant denies that the approvals set forth in its ordinance are invalid, and would show that they are analogous to and consistent with land use approval regularly required of churches in the planning, plotting, and zoning process. Defendant would further show that no significant "particularized message" is involved in the siting of the church, or its exterior design, at least to the extent that such speech or expression, if present, are still permitted on the same parcel of property. Defendant denies that it imposes controls on the interior of the church under its ordinance. Defendant denies that the Free Exercise clause or the statute or the RFRA prevent historic preservation requirements for the 1923 church, which can still be utilized fully by interior remodeling or refurbishing for religious purposes. Defendant denies that the convenience of siting rises to the level of any constitutional magnitude. Defendant denies

that the financial burdens imposed constitute a "substantial burden" under established constitutional principles and standards.

23. Defendant denies the allegations in Paragraph 30, and would affirmatively state the City's interest in historic preservation is a compelling state interest within the context of this controversy, and the specific structure at issue in this case.

24. Defendant denies the allegations of Paragraph 31 of the Plaintiff's Second Amended Complaint. The City does not preclude the Plaintiff from any alternation of the 1923 St. Peter Church. The Defendant has only denied the request to demolish approximately 90 percent of the existing structure. Since the City's ordinance only applies to visible portions of the exterior of the church, it is the least restrictive means of furthering the City's interest.

25. Defendant denies the allegations in Paragraphs 32 through 38, setting forth the Plaintiff's legal conclusions concerning violation of the First Amendment Free Exercise clause. Defendant denies the claim that its statute is not a penal statute, or a valid or neutral law of general applicability. Defendant denies that the ordinance is an impermissible burden on the free exercise of religion, and would show that the ordinance does not substantially burden the exercise of religion by the St. Peter Catholic Church. Defendant denies that this case presents a hybrid claim, or that cognizable speech or associational rights are impaired. Defendant further denies that its ordinance, or the review and approval of proposed plans constitute impermissible or excessive entanglement in

church affairs or matters of religion. Defendant further denies the allegations in Paragraph 36 through 38 setting forth legal conclusions and would show that feasible alternatives exist which do not impose significant burdens. The City would show that as applied to this church structure, its interest is compelling. The City's ordinance seeks to apply the least restrictive means, by preserving only the visible exterior portion of the church building.

26. Defendant denies the conclusions set forth in Paragraphs 39 through 43 that free speech rights of the Plaintiff are violated by the City's ordinance. Defendant denies that any particularized message is conveyed which is subject to constitutional restriction. The City's ordinance does not impair or limit the associational rights of the members, since the right to expand and develop larger worship space remains.

27. Defendant denies the allegations in Paragraph 44 which conclude that due process and equal protection violations exist. Defendant denies that correct interpretation of the ordinance excludes any portion of the 1923 structure. Defendant denies that its delineation of the historic district was arbitrary and capricious. Defendant denies the claim that it does not have a preservation plan. Defendant would show that its ordinance and the associated materials represent the City's preservation plan. Defendant denies that its ordinance provides or contemplates unbridled discretion and authority. The ordinance sets forth specific criteria for evaluation. Defendant denies that its building inspector has unlimited or indefinite discretion with respect to application of the ordinance. Defendant further denies the ordinance

construction urged by the Plaintiff, which would exclude the church from its terms and conditions.

28. Defendant denies the conclusion alleged in Paragraph 45 that a taking or inverse condemnation has occurred. Full and free utilization of the Plaintiff's property for religious purposes still remains and exists, subject only to the limited restrictions set forth in the Defendant's ordinance. These restrictions do not meet the Fifth Amendment standard for a compensable taking or inverse condemnation.

29. Defendant denies the allegations in Paragraphs 46 through 50 concluding an alleged violation of the provisions of the Texas Constitution. Defendant denies that violations of Article 1, § 29 and Article 1, § 6 exist.

30. Defendant denies the allegations in Paragraphs 51 and 52 concluding that a taking or damaging of property results from the application of its ordinance under Article 1, §§ 17 and 19 of the Texas Constitution. Defendant's land use limitations on the Plaintiff's use of its property are reasonable restrictions in the exercise of its police power, and do not limit or deny the reasonable economically utilization of the Plaintiff's property to the point where compensation is required.

31. Defendant joins the Plaintiff in Paragraph 53 in seeking a declaratory judgment.

32. Insofar as a Rule 8 response is necessary, Defendant denies the allegations contained in Paragraph 54 of Plaintiff's Second Amended Complaint.

33. The City agrees that the Plaintiff has exhausted any necessary administrative remedies for the current

plan or proposal. To the extent that the Plaintiff has a legal right to proceed with its initial proposal under the theories alleged, the City agrees that the Plaintiff has standing, and that the case is ripe for review. To the extent that the Plaintiff's claim depend upon the actual denial of any reasonable use, or any feasible alternative which does not substantially burden the free exercise of religion, the City denies that this case is ripe for review, since no alternative designs have been presented to the building inspector, the Historic Landmark Commission or the City Council, in accordance with the terms and provisions of the ordinance.

34. Defendant denies the allegations in the Prayer for Relief contained in Plaintiff's Second Amended Complaint.

Additional and Affirmative Defenses

35. The City denies that ordinance no. 91-05 (as amended by ordinance 94-17) is unconstitutional. Defendant contends that the ordinance is constitutional and is consistent with the correct legal construction of the First and Fourteenth Amendments.

a. Defendant contends that this ordinance satisfies the free exercise clause under the First Amendment, and does not place an unlawful burden on the Plaintiff's religious exercise. Defendant contends that the ordinance meets the rational basis test which should properly be applicable to this penal ordinance of general applicability within the City's historic district.

b. In the alternative, if the court finds that strict scrutiny, and a compelling interest are required, Defendant contends that its Historic Preservation Ordinance, limited to a historic district, and applied in such a manner as to allow a full and continued use of the Plaintiff's property for existing and new structures for religious worship meet the applicable test.

c. Any effect on the church's value is incidental to the City's proper and lawful exercise of its police powers.

36. The city denies that Ordinance No. 91-05(7) (as amended by ordinance 94-17) violates the Freedom of Speech and Expression clause of the First Amendment.

a. The City's Historic Preservation Ordinance is not content based by any stretch of the imagination, and does not restrict the freedom of expression of the church with respect to construction upon its property.

b. The City's Historic Preservation Ordinance does not impose controls on the interior of the church. Development of the church, including the existing 1923 church structure are permitted and feasible, with or without demolition of portions of the existing structure, and could be permitted upon proper application to the City under the ordinance.

c. Once feasible alternatives are evaluated, it is apparent that any "expression" based aspects of the church's proposed new building can still exist on this same site.

d. There is no speech or expressive component, and no particularized message set forth in

the church's preference as to a site, location, or its building design, to the extent that it is still feasible and permitted on the site.

37. The City denies that the ordinance as applied is a Fifth Amendment taking. The ordinance regulates utilization of the church structure in order to accomplish historic preservation, and leaves the interior of the facility available for free utilization without restrictions or controls. It is still feasible to use the property to construct a free standing church of the same or similar design as proposed by Plaintiff. Upon a proper application, other structures or buildings could be attached or connected to the existing church, without destruction of the exterior portions of the building which are visible to public streets, further expanding utility and feasibility of use of the structure. These limitations do not constitute the level of impairment of value that create a taking under the Fifth Amendment.

38. The City denies that ordinance no. 91-05 (as amended by ordinance 94-17) violates applicable provisions of the Texas Constitution guaranteeing religious freedom.

39. The City denies that ordinance no. 91-05 (as amended by ordinance 94-17) violates applicable provisions of the Texas Constitution guaranteeing freedom of speech.

40. The City denies that the ordinance as applied to the Plaintiff violates article 1, § 17 of the Texas Constitution. The ordinance regulates private property, and is a valid exercise of the City's police powers under established Texas law. The City's regulations do not impair the

feasibility of the continued use of the church structure for worship, education, or any other form of religious expression and activity. The ordinance does not impair the feasibility of use of the existing structure in connection with or as a part of additional buildings or structures necessary for the growth of the church and its congregation.

41. The City denies that ordinance no. 91-05 (as amended by ordinance 94-17) violates § 3 of the Religious Freedom Restoration Act of 1993. The City contends that this statute is an impermissible attempt by Congress to modify the meaning and interpretation of the constitution, as established by the Supreme Court. Congress has no constitutional authority to modify or change the interpretation of the United States Constitution which is applicable to the states under the Fourteenth Amendment. For this reason, any interpretation or application of the Religious Freedom Restoration Act of 1993 which imposes a statutory revision in the applicable standards of First Amendment jurisprudence is not valid, taking into account the operative provisions of Article III, the Free Exercise clause of the First Amendment, Section 5 of the Fourteenth Amendment, and the Tenth Amendment.

42. If the RFRA is unconstitutional, the City says that its historic preservation ordinance is a penal statute of general and neutral applicability, and that it should properly be subject to the standards of review set forth in Employers Division, Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), as such, the Court's analysis does not require that strict scrutiny of the ordinance be employed, or that a compelling interest be found for any effects upon religious activities and

practices. The St. Peter Church is in no different position than any other property owner in the City of Boerne, and has not been regulated or treated differently in any respect on the basis of its religious beliefs or practices.

43. If the Court upholds the RFRA, the City says that historic preservation can be a compelling interest in a "free exercise" context. The Court must balance the burden imposed, with the public objective sought to be obtained. The 1923 St. Peter Church building has historic significance, and is an important and readily recognized feature of the public image and character for the City of Boerne. The 1923 church, in conjunction with the 1867 original sanctuary building, clearly has historic significance. Its prominence in location and the history of the community, makes the preservation of all or part of this structure a compelling local interest.

44. Because of the feasibility of alternative site locations, and the potential for the church's chosen design to be constructed elsewhere on the site, together with the relative magnitude of the additional costs which may or may not be involved, the Court finds that there is not a significant burden on the free exercise of religion imposed by the City of Boerne historic preservation ordinance for this particular site.

45. The object of historical preservation, limited by proper construction of the ordinance itself, is inherently the least restrictive means available for the accomplishment of the objective. The City has made a determination of the historical value of this structure which is supported by the legislative record. The only way to accomplish the objective of preservation is to preserve the

portions of the structure that have visibility and direct impact on the community. The City's own reading of its ordinance is limited to the portions of the structure which are visible from the City's public thorough fares. Since the ordinance does not limit the internal change, modification, or utilization of the structure, and allows the portions of the structure which are not readily visible to the public to be utilized in whatever manner the owner sees fit.

46. The City denies that its refusal to grant a building permit is unlawful or impermissible. The City contends that its actions were consistent with the due process clauses of the U.S. and Texas Constitutions.

a. The actions of the Defendant meet the rational basis test, and demonstrate a legally sufficient basis for legislative action. In the alternative, if a compelling interest is required, the City contends that a compelling interest exists in the context of this particular structure in the City of Boerne, Texas, for the purpose of historical preservation.

b. The clerical errors complained of concerning citations to the City's authority are wholly irrelevant, as the City clearly has the zoning and land use authority to pass and adopt the ordinance under the provisions of Texas law.

c. The adoption of the City's Historic Preservation Ordinance is consistent with the requirement for a comprehensive plan. The City of Boerne has a comprehensive plan, in the process of studying and evaluating the Historic Preservation Ordinance since 1979, together with the collected materials which

were part of the recommendation and presentation by the Landmark Commission and the Planning and Zoning Commission are correctly interpreted as a matter of law to be the "preservation plan" of the City, to the extent that such a plan is a technical requirement of state law or the ordinance itself.

d. The City contends that its building inspector acted in a timely fashion, considering the necessary and legal interpretation of the ordinance prior to his action. The City further contends that the time periods in the ordinance are directory, and not mandatory.

e. The City contends that the correct construction of § 3.1.4 of the ordinance does not accept or excuse non-compliance by the Plaintiff. The incentives provided in this section are not legally necessary, nor are they required as a pre-condition to the regulations in the ordinance.

f. The City contends that § 6 of the ordinance as properly interpreted allows the current use of the property, and the continuing occupation, maintenance, and use of the church, as an independent sanctuary, as a religious educational space, or as a part of a larger structure, properly designed and permitted, which does not destroy or demolish the visible portions of the exterior of the church.

47. The City's ordinance causes no injury to the associational interest of the Plaintiff or the congregation members virtually represented by the Plaintiff. Since it is feasible for the church to conduct its worship activities within an enlarged new congressional worship space, the

associational freedoms of the congregation members are preserved, and are not burden or impaired under the City's ordinance.

48. There is no unlawful or excessive entanglement of the government and religious affairs under the provisions of the City's ordinance. The City has merely rejected a proposal or plan which clearly envisioned destruction of visible portions of the 1923 church structure. That destruction was prohibited by the ordinance, and rejection of that plan was appropriate by the City commissions and boards charged with the responsibility for review and approval or denial. The government's willingness to consider alternatives, and to communicate with constituents about the interpretation and application of its ordinances, does not result in unconstitutional entanglement.

49. Defendant asserts the well-established law in Texas that a City acts only by and through the official actions of the governing body as evidenced by authenticated minutes, ordinances and resolutions, and that the statements, acts or promises of the mayor, council members, or other municipal officers and employees are ineffectual.

50. Defendant says that the building permit application from Gregory Davis of Davis-Rupe Architects, representing the Archdiocese of San Antonio, is for proposed construction on Lots 16, 17, 18, 19, 20 and 21, Kernaghan Addition. The Archbishop of San Antonio is the owner of record title to those lots. However, no portion of the existing church building of St. Peter Catholic Church lies

on the referenced lots. The referenced lots lie outside the boundaries of the Historic District.

51. Defendant says that the owner of record title to the building and appurtenant land described in Plaintiff's Second Amended Compliant as an "UN-NUMBERED TRACT OUT OF THE KERNAGHAN ADDITION," is the Roman Catholic Bishop of Galveston. The existing church building of St. Peter Catholic Church lies wholly within that tract.

DESIGNATION OF ATTORNEY-IN-CHARGE

52. Lowell F. Denton of Denton, McKamie & Navarro, A Professional Corporation, shall serve as attorney-in-charge for Defendant.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that Plaintiff's claims be denied in their entirety, that Defendant recover from Plaintiff its reasonable and necessary attorney's fees for defense of this cause, and for such other and further relief to which this Court may deem Defendant justly entitled.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been served upon the below named individuals in the specified manner and according to the Federal Rules of Civil Procedure on the 10th day of _____ March, 1995.

Mr. Thomas Drought — **HAND DELIVERY**
Ms. Patricia Schofield
DROUGHT & PIPKIN, L.L.P.
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/s/ Lowell F. Denton
LOWELL F. DENTON
WILLIAM M. MCKAMIE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

P.F. FLORES,
ARCHBISHOP OF
SAN ANTONIO

CIVIL ACTION
NO. SA94CA0421

V.

THE CITY OF BOERNE

EXHIBIT 5-PTO
STIPULATED FACTS

The stipulated facts listed below are drawn from the pleadings and discovery materials in this case.

a. Ordinance Number 85-11 of the City of Boerne, dated May 20, 1985, authorized the creation of a Landmark Commission.

b. The Landmark Commission for the City of Boerne was appointed on November 10, 1987.

c. On February 16, 1988, the Landmark Commission began exploring the creation of an historic district in the City of Boerne.

d. On March 1, 1988; March 29, 1988; May 4, 1988; August 8, 1988; February 20, 1990; March 13, 1990; April 17, 1990; May 29, 1990; October 10, 1990; February 16, 1991; and September 16, 1991, meetings of the Landmark Commission were held to discuss the historic district boundaries.

e. Ordinance Number 89-04, dated July 25, 1989 amended Ordinance Number 85-11.

f. On April 17, 1990; May 29, 1990; and October 10, 1990 public hearings of the Landmark Commission were held to discuss and determine the historic district boundaries. Notices of these public hearings were duly posted in advance at City Hall.

g. On October 1, 1991, the Historic Landmark Commission recommendation for creation of the historic district was presented to the Planning and Zoning Commission.

h. In December 1990, Plaintiff authorized Father Anthony Cummins, the parish priest of St. Peter Church, to begin planning to enlarge the church to enable the congregation to attend services and other religious functions.

i. Plaintiff is the Roman Catholic Archbishop of San Antonio.

j. Ordinance Number 91-05, dated June 25, 1991 amended and superseded Ordinance Number 89-04.

k. On December 14, 1993, a building permit application was submitted on behalf of the Archdiocese of San Antonio for the "expansion of Saint Peter's Church and related site improvements."

l. The criteria used to determine the historical significance of a property is listed in Section 6.1 of Ordinance Number 91-05. Identical criteria was contained in Section 5A of Ordinance Number 89-04.

m. Saint Peter Church and its related site improvements are used for the practice of religion.

n. The Saint Peter Church occupies 5.526 acres of land more or less, of which only a portion is presently occupied by existing structures.

o. The population of the City of Boerne and the Catholic congregation served by Saint Peter Church has greatly increased since 1923.

p. Saint Peter Church is used for the practice of religion.

q. In March of 1991, Father Cummins appointed certain parishioners to a planning committee to discuss the feasibility of enlarging the existing church building to afford seating space for parishioners at regular services.

r. Ordinance No. 91-15, dated January 14, 1992, added the Historic (Overlay) District to the City of Boerne Zoning Map (Revised 1991).

s. The Plat, listed as Defendant's Exhibit "D-40" depicts the boundaries of the historic district adopted by the City Council in January of 1992. The boundary lines shown on the plat of the historic district bisects the structure currently used as the sanctuary for Saint Peter Church.

t. Saint Peter Church is not an "historic landmark" as that term is defined in Ordinance Number 91-05.

u. On February 1, 1994, the Landmark Commission considered the application for building permit. That meeting was recessed and continued on February 15, 1994.

v. On February 15, 1994, the Landmark Commission conducted a public hearing and considered the application for a building permit of Saint Peter Church. The Landmark Commission

found that the proposed plan would adversely affect the historic district and is inappropriate or inconsistent with the spirit and purposes of Ordinance Number 91-05, and the Landmark Commission advised the City Building Inspector that the pending permit application cannot be approved until certain changes to the permit application are made.

w. On February 17, 1994, the City Building Inspector, Ed Beasley, sent a letter to Mr. Gregory Davis, Davis-Rupe Architects, as representative of the Archdiocese of San Antonio, advising of the Landmark Commission's decision pertaining to the building permit application.

x. On April 6, 1994, Saint Peter Church requested to be put on the City Council agenda for April 12, 1994 to appeal the decision of the Landmark Commission.

y. After due notice and a public hearing, the City Council of the City of Boerne voted at a regular meeting on April 12, 1994 to deny the appeal of Saint Peter Church concerning the building permit application.

z. As a part of the Landmark Commission evaluation an inventory was conducted of the historical resources in the community. A document evaluating the historic significance of those structures, including both of the church structures known as the Saint Peter Church, are included in that inventory. The Landmark Commission identified both structures as meeting several of the criteria for historic classification.

aa. On or about November 20, 1991, written notice of the December 3, 1991 hearing of the Planning and Zoning Commission and City Council for

the creation of the historic district in the City of Boerne was given to Plaintiff.

bb. Representatives of both parties held subsequent meetings to consider and evaluate alternative locations and designs, which would preserve the 1923 church structure.

cc. Representatives of both parties have actively considered alternative site designs, but have been unable to reach a consensus or agreement on a proposal does not demolish all or a substantial portion of the 1923 church structure.

dd. As a part of the Landmark Commission evaluation, an inventory was conducted of the historical resources in the community. A document evaluating the historic significance of those structures, including both of the church structures known as the Saint Peter Church, are included in that inventory. Both structures were identified as meeting several of the criteria for historic classification.

ee. On or about November 20, 1991, written notice of the December 3, 1991 hearing of the Planning and Zoning Commission and City Council for the creation of the historic district in the city of Boerne was given to Plaintiff.

ff. The building permit application filed by the Plaintiff specifically references lots 16, 17, 18, 19, 20 and 21. The 1923 church structure is not located on these lots. The site plan drawings filed with the application show the location of the church and reference its location.

gg. The City's historic preservation ordinance was amended in October 1994 by ordinance no. 94-17, which made several changes and

redefined the historic district to include the entire 1923 church structure.

hh. Action was taken within forty-five days after the application was received by the Chairman of the Landmark Commission.

ii. The City of Boerne, Texas enacted a non-binding resolution on January 31, 1995 proposing to close a portion of Kronkosky St. in order to facilitate the construction of a new church building, without destruction of the 1923 church structure.

jj. The Saint Peter Church occupies 5.526 acres of land more or less, of which only a portion is presently occupied by existing structures. It is a matter of dispute whether the two sanctuary buildings on the site have historical significance. The other structures on the site have no historical significance, and little if any architectural significance.

kk. The title to the land on which St. Peter Church is situated is in the name of Right Reverend Claudius M. Dubuis, Roman Catholic Bishop of the Diocese of Galveston, and his successors and all subsequent successors.

ll. Plaintiff, P.F. Flores, Archbishop of San Antonio, is the subsequent successor of Bishop Dubuis, and holder of record title to the property on which the 1923 sanctuary is located.

mm. The changes to the permit application which the Landmark Commission decision required that "any new plans shall not include demolition of the existing structure referred to as St. Peter's Catholic Church." The Landmark Commission offered to "work with" Plaintiff if

Plaintiff wished to pursue construction of a new structure in the historic district.

nn. The congregation and parish of the Saint Peter Church occupies 5.526 acres of land, more or less, of which only a portion is presently occupied by existing structures. There are two church sanctuaries on the property, constructed in 1867 and 1923. Both parties agree that the 1867 church structure has historical significance. The parties disagree about the historical significance of the 1923 building. Both parties agree that the other structures on the site have no historic significance, and little if any architectural significance.

oo. The Roman Catholic Church is parish-based, such that Catholics are encouraged to attend church in their own parish and to be active in parish affairs.

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO V. THE CITY OF BOERNE	SA-94-CA-0421

ORDER

(Filed Mar. 16, 1995)

Pursuant to the Court's February 3, 1995 Certification Order, it has provided the United States the right to intervene in the above-captioned action in order to defend the constitutionality of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb. On March 6, 1995, the United States notified the Court that it elected to intervene in order to defend the constitutionality of the Religious Freedom Restoration Act and filed a brief on the issue on the same day. Accordingly,

IT IS HEREBY ORDERED that the United States is granted leave to intervene in this action.

SIGNED this 13th day of March, 1995.

/s/ Lucius D. Bunton
HONORABLE LUCIUS D.
BUNTON III
SENIOR DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-00067
USDC No. SA-94-CA-0421

P.F. FLORES, ARCHBISHOP
OF SAN ANTONIO,

Plaintiff-Petitioner,

and

UNITED STATES OF AMERICA,

Movant-Petitioner,

versus

CITY OF BOERNE,

Defendant-Respondent.

Petitions for Leave to Appeal
an Interlocutory Order

(Filed May 9, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

BY THE COURT:

ORDER
No. 95-00067

When a district court certifies an order pursuant to 28 U.S.C. § 1292(b) in which a Fed. R. Civ. P. 54(b) certification is more appropriate, we view the certification as

brought pursuant to Rule 54(b). See DeMelo v. Woolsey Marine Indus., Inc., 677 F.2d 1030, 1032 (5th Cir. 1982). By holding the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb through 2000bb-4, unconstitutional, the district court effectively eliminated the first cause of action of P.F. Flores, the Archbishop of San Antonio, Texas.

"It is settled that Rule 54(b) is limited to orders that would be 'final' if entered in a simple single-claim, two-party case." DeMelo, 677 F.2d at 1032. "[W]hen the facts give rise to more than one legal right or cause of action, and the two grounds of recovery are not mutually exclusive, there are multiple claims which can be separately appealed upon certification under Rule 54(b)." H & W Indus., Inc. v. Formosa Plastics Corp., USA, 860 F.2d 172, 176 (5th Cir. 1988). Therefore, IT IS ORDERED that the appeal is GRANTED pursuant to Rule 54(b).

IT IS FURTHER ORDERED that the expedited briefing schedule as proposed in the government's motion to amend briefing schedule filed April 14, 1995 is GRANTED. The request by the City of Boerne, Texas, for this court to certify to the Supreme Court the legal question of the constitutionality of RFRA, see 28 U.S.C. § 1254(2), will be considered by this court after the parties have filed their briefs.

[initialed at bottom of first page]

RHB 4/22/95 EJH 5/2 FPB 5-5-95